IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1572

APACHE COUNTY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

Appeal from the United States District Court for the District of Arizona

---

MOTION TO DISMISS OR AFFIRM

RICHARD B. COLLINS
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone: (303) 447-8760

ALAN R. TARADASH
P. O. Box 306
Window Rock, Arizona 86515
Telephone: (602) 871-4151

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

14237-6-76

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION, STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1572

APACHE COUNTY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

Appeal from the United States District Court for the District of Arizona

---

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Appellees Leslie E. Goodluck, Kenneth Chee, Steven Ashley, Sr., Stanley E. Ashley, and Anderson Yazzie respectfully move this Court to dismiss this appeal, on the ground that the claimed violations of Constitutional rights are hypothetical, speculative, and thus premature for adjudication.

In the alternative, appellees move the Court to affirm the judgment of the court below on the grounds that: (1) it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument; (2) the decision below is obviously correct.

STATEMENT OF THE CASE

Plaintiffs Goodluck, et al., are five residents of northern Apache County, Arizona, who filed one of two actions later consolidated seeking reapportionment of the Apache County Board of Supervisors on the basis of the one-man, one-vote principle.[1] The United States later filed an action to the same end which added an additional claim of racial discrimination.

The facts relevant to the reapportionment claims are not in dispute. Apache County is a political subdivision of the State of Arizona. The Board of Supervisors is its governing body and exercises general governmental authority in the county. There are three supervisors, elected from geographic districts within the county. The Board's authority includes defining of the territorial limits of supervisorial districts within the county. By statute districts are required to have substantially equal population. Ariz.Rev.Stat. § 11-212. According to the 1970 federal census, the approximate population of Apache County's three districts is: District 1, 1700; District 2, 3900; District 3, 26,700. District 3 is entirely within the Navajo Indian Reservation. The approximate Indian population of the three districts is: District 1, 70; District 2, 300; District 3, 23,600.

Defendants in these cases are Apache County and its officials. In both cases they filed counterclaims and brought in the State of Arizona and various state

[1] The Jurisdictional Statement alleges that these five plaintiffs are "Navajo Reservation Indians." While this allegation is irrelevant to any claim made in these cases, the fact is that four of the plaintiffs are Navajo and one is non-Indian. Plaintiffs' Answers to Defendants' Interrogatories.

and federal officials as additional defendants. The counterclaims assert that allowing reservation Indians to vote or be counted as part of the county's population for apportionment violates the Fifth and Fourteenth Amendments; that the federal laws making Indians citizens are unconstitutional; and that the Arizona laws interpreted by the officers and courts of the state to allow Indians to vote and be counted for apportionment are unconstitutional. Injunctive relief was sought and, pursuant to 28 U.S.C. §§ 2281-2282, a three-judge court was convened. That court denied injunctive relief on the counterclaim, and defendants/counterclaimants now appeal from that denial.

Appellants moved the court below for an injunction or stay pending appeal; this motion was denied. A similar motion to Justice Rehnquist was also denied. The jurisdictional statement was received by counsel for appellees Goodluck, et al., on April 23, 1976, and this appeal was docketed on April 27, 1976.

ARGUMENT

I. Introduction

Appellants ask this Court to enjoin as unconstitutional the federal statutes making Indians citizens and the Arizona laws allowing them to vote and be counted as residents of the state for apportionment purposes. Despite seven headings, the arguments made raise essentially two points:

(1) The federal laws making Indians citizens violate the Fourteenth Amendment;

(2) The special status of reservation Indians within the federal system makes it unconstitutional

for Indians to vote or to be counted for apportionment of the Board of Supervisors.

II. Indians Are Citizens

Appellants urge that 8 U.S.C. §1401(a)(2) is an unconstitutional attempt to confer citizenship on Indians born in the United States. This oversimplifies the question, since by the time of enactment of the original version of 8 U.S.C. §1401(a)(2) in 1924, an estimated two-thirds of the Indians in the United States were already citizens pursuant to other federal statutes. F. Cohen, *Handbook of Federal Indian Law,* page 153 (1942 ed., U.N.Mex. Reprint 1971).

Appellants argue that the statutes naturalizing American Indians violate the Fourteenth Amendment. Appellants rely on that portion of the amendment granting citizenship, Section 1, which was construed not to include an Indian born before 1871 in *Elk* v. *Wilkins,* 112 U.S. 94 (1884). In *Elk* the Court ruled that Mr. Elk was not born "subject to the jurisdiction" of the United States as specified in the Fourteenth Amendment, Section 1.

In *Elk* the Court had no occasion to consider the status of Indians born in the United States after 1871, when Congress enacted 16 Stat. 566, now 25 U.S.C. §71. This statute ended treaty-making with Indian tribes, which were "no longer regarded as sovereign nations," *DeCoteau* v. *District County Court,* 420 U.S. 425 (1975). Court decisions since 1871 establish that Indians and Indian tribes are generally subject to federal law in common with other citizens. *Federal Power Com'n* v. *Tuscarora Indian Nation,* 362 U.S. 99, 115-118 (1960). That decision expressly confined *Elk* v. *Wilkins, supra,* to history: "However

that may have been, it is now well settled by many decisions of this Court that a general statute in terms applying to all citizens includes Indians and their property interests." 362 U.S. at 116. Thus an Indian born in the United States since 1871 comes within the terms of the Fourteenth Amendment, Section 1.

A second basis for the *Elk* decision relied on the Fourteenth Amendment, Section 2, which established apportionment for the United States House of Representatives according to population "excluding Indians not taxed." The Court in *Elk* reasoned that the Congress in drafting and approving the Fourteenth Amendment did not intend to grant citizenship in Section 1 to Indians excluded from apportionment in Section 2. As noted above, Indians are now subject generally to all federal taxes, and in theory this rule dates from 1871. However, the court decisions establishing this rule date only from the 1930's, by which time all Indians had been naturalized by statute. *Federal Power Com'n* v. *Tuscarora Indian Nation, supra,* 362 U.S. at 116-117. For this reason the courts have never considered the effect of 25 U.S.C. §71 on the *Elk* v. *Wilkins* rationale.

In the court below appellants argued that Indians are not "subject to the jurisdiction" of the United States in any respect, state or federal. The Jurisdictional Statement does not repeat this error, but the suggestion remains by inference, since appellants rely on a student note from the *Arizona Law Review,* Note, 15 Ariz.L.Rev. 973 (1973). This note clearly assumes the erroneous premise that the laws of the United States do not apply to Indians. 15 Ariz.L.Rev. at 997.

Appellants' argument now focuses on the fact that Indians while on reservations are not subject to many state laws. This point is discussed in more detail in the next section; appellants also urge it here, apparently claiming that:

(A) The Fourteenth Amendment not only granted citizenship to former slaves, it affirmatively excluded from citizenship anyone not "subject to the jurisdiction" of the United States; and

(B) "Subject to the jurisdiction" of the United States means subject to all state laws as well as federal; and

(C) "Indians not taxed" means Indians exempt from state property taxes, even if they pay other taxes; and

(D) Citizenship requires full state jurisdiction as a matter of Constitutional law.

A. The Fourteenth Amendment Does Not Limit Congress' Power to Naturalize

There is no authority for the first proposition above. The Constitutional power over citizenship was originally totally within Congress' authority, Constitution, art. 1, sec. 8, cl. 4. The Fourteenth Amendment eliminated Congress' power to deny citizenship to anyone born in the United States and subject to its jurisdiction, and the amendment denied to the states any authority over citizenship. This Court summarized the latter point in the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1873). But there is no authority for the proposition that the Fourteenth Amendment reduced Congress' power to naturalize. *Elk* v. *Wilkins,*

supra, is not such authority, since the Court in *Elk* expressly recognizes that Congress can naturalize Indians. 112 U.S. at 101.

B. Indians Are "Subject to the Jurisdiction" of the United States

As the court below noted, this Court in the *Slaughter-House Cases, supra,* 83 U.S. (16 Wall.) at 73-74, made it clear that the phrase "subject to the jurisdiction thereof" in the Fourteenth Amendment, Section 1, refers only to the jurisdiction of the federal government and did not require subjection to state jurisdiction.

C. There No Longer Are "Indians Not Taxed"

The phrase "Indians not taxed" in the Fourteenth Amendment, Section 2, is no longer literally true as to any Indians, since most federal taxes are collected from Indians, and a few state taxes are as well even on reservations. There is no basis in the literal phrase, nor support in any authority, to give the phrase the meaning appellants assert.

D. Citizenship Is Compatible with Tribal Existence

The proposition that citizenship and continued federal guardianship over Indians are incompatible once had support in a case cited and relied upon by appellants. *In re Heff,* 197 U.S. 488 (1905). However, that case was expressly overruled by *United States* v. *Nice,* 241 U.S. 591, 598 (1916), where the Court stated:

> Citizenship is not incompatible with tribal existence or continued guardianship and so may be

> conferred without completely emancipating the Indians, or placing them beyond the reach of Congressional regulations adopted for their protection.

See also Creek County v. *Seber,* 318 U.S. 705, 718 (1943); *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 310-313 (1911).

Finally, the Constitutionality of the particular statute attacked by appellants, 8 U.S.C. § 1401(a)(2), has been repeatedly upheld by the lower courts. *Williams* v. *United States,* 406 F.2d 704 (9th Cir. 1969), *cert. denied,* 394 U.S. 959; *Albany* v. *United States,* 152 F.2d 266 (6th Cir. 1945); *Ex parte Green,* 123 F.2d 862 (2d Cir. 1941), *cert. denied,* 316 U.S. 668; *United States* v. *Neptune,* 337 F.Supp. 1028 (D.Conn. 1972); *Totus* v. *United States,* 39 F.Supp. 7 (E.D. Wash. 1941).

For these reasons, appellants' contention that the laws naturalizing Indians are unconstitutional is without merit. Furthermore, Indians born after 1871 are citizens by birth under the Fourteenth Amendment, Section 1.

III. The Special Status of Indians Does Not Render Unconstitutional Indian Participation in County Government

The remaining contentions of appellants all derive from the special status of Indians within the federal system. Unlike other citizens, reservation Indians are subject to the plenary control of Congress, rather than the divided authority of Congress and the States. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903). As a result, Indians while on reservations are subject to state law only when Congress so provides, or where

there is no interference with federal policies including the important policy of tribal self-government. Appellants thus contend that Indians will participate in the making of laws to which they are not subject and will "destroy" others by abuse of the taxing power.

In summary, appellees' responses are:

(A) No actual abuse is presented on this record; the complaint is premature at best.

(B) Appellants do not present an accurate picture of Arizona County government; reservation Indians do have a significant stake in it.

(C) Indians are residents of the state.

(D) Some of appellants' more dramatic speculations are not the law.

A. Appellants' Contentions Are Premature

To reach some of the hypothetical situations suggested by appellants, one must assume that in addition to the Indian population majority, there would be an Indian majority of registered voters; an Indian majority of actual voters; an Indian majority that is unified enough to elect its own choices; and the Indians' choices would act unlawfully or improperly. Present facts do not support these speculations. Indians have voted in Arizona since 1948. *Harrison* v. *Laveen,* 67 Ariz. 337, 196 P.2d 456 (1948). Yet in 28 years not one Indian has been elected to county-wide office in Apache County. The only Indian official in the county is appellant Tom Shirley, the supervisor from District 3. The county opposed his taking office in the Arizona courts, which ruled against the county, rejecting many of the same arguments now being

made to this Court. *Shirley* v. *Superior Court,* 109 Ariz. 510, 513 P.2d 939 (1973), *cert. denied,* 415 U.S. 917.

Furthermore, since county governments are under state control, state remedies may well prove adequate should any of the extreme fears of appellants come to pass.

For these reasons resort to the federal courts to solve speculative and hypothetical problems is premature. To the extent the present appeal is based on such grounds, it should be dismissed.

B. Indians Have a Stake in County Government as It Actually Functions in Arizona.

Appellants' speculations imply greater powers to Arizona county governments than exist. Arizona counties have only those powers expressly allowed by the legislature. *Hart* v. *Bayless Inv. & Trading Co.,* 86 Ariz. 379, 346 P.2d 1101 (1959). The most persistent plaint of appellants, possible abuse of the taxing power, is a chimera. The only tax levied by the Board of Supervisors that is discretionary in amount is the general county levy on taxable property, yet this tax is by statute limited to $2 per $100 of assessed valuation (20 mils). Ariz.Rev.Stat. § 11-251(12). While most Indian property is exempt from this tax,[2] so is the bulk of the off-reservation part of Apache County, which is national forest, public domain, and national parkland. The overwhelming proportion of taxable

[2] The exceptions include certain mineral production, 25 U.S.C. §§ 398, 398c, Industrial Uranium Co. v. State Tax Com'n, 95 Ariz. 130, 387 P.2d 1013 (1963); former allotments, 25 U.S.C. § 349; and non-Indian interests in Indian property.

property in the county is mining, utilities, and railroad property, located both on and off the two Indian reservations in the county.

The actual functions of county government in Arizona are typical of those elsewhere: education, law and order, roads and highways, and the conduct of federal, state and local elections. The majority of Arizona Indians attend state-controlled public schools, which are lawfully established on the reservations. *Indian Oasis School District No. 40* v. *Zambrano,* 22 Ariz.App. 201, 526 P.2d 408 (1974); *cf., Prince* v. *Board of Education,* 88 N.M. 548, 543 P.2d 1176 (1975). In the field of roads and highways, the state gasoline tax is collected from reservation Indians (apparently pursuant to 4 U.S.C. § 104), and the Board of Supervisors controls the spending of part of the taxes collected. Ariz.Rev.Stat. § 28-1502. Other local concerns are placed under state law authority by 25 U.S.C. § 231. The Indians' status on the reservation does reduce (though does not eliminate) their interest and involvement in the county's courts and sheriff. But overall, they have a significant interest in county government.

In two cases this Court has struck down as unconstitutional state attempts to disenfranchise residents of other kinds of federal enclaves. *Evans* v. *Cornman,* 398 U.S. 419 (1970); *Carrington* v. *Rash,* 380 U.S. 89 (1965). In other cases the Court has struck down laws attempting to confine voting to owners of taxable property. *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970); *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969). By contrast Arizona has not sought

to limit the franchise by statute; appellants seek to do so by court action to invalidate state statutes.

C. Indians Are Residents

Appellants contend that reservation Indians whose reservations are physically within the boundaries of Arizona are not residents of Arizona. They argue that state court service of process will not reach a reservation Indian and equate the reach of process with residence. This argument borders on the frivolous.

In the first place the Arizona courts have ruled contrary to its premise. In *Francisco* v. *State,* 25 Ariz. App. 164, 541 P.2d 955 (1975), the court ruled that state civil service of process on an Indian on the reservation is valid. *See also State Securities, Inc.* v. *Anderson,* 84 N.M. 629, 506 P.2d 786 (1973). The cases cited by appellants are inapposite. *Martin* v. *Denver Juvenile Court,* 493 P.2d 1093 (Colo. 1972), was decided on a point of state law, not on the basis of lack of state power. *Annis* v. *Dewey County Bank,* 335 F.Supp. 133 (D.S.D. 1971), involved seizure of property, not service.

Arizona courts have repeatedly ruled that Indians are residents of the state and entitled to the benefits of residence: *Shirley* v. *Superior Court,* 109 Ariz. 510, 513 P.2d 939 (1973), *cert. denied,* 415 U.S. 917; *Harrison* v. *Laveen,* 67 Ariz. 337, 196 P.2d 456 (1948); *Bradley* v. *Arizona Corp. Com'n,* 60 Ariz. 508, 141 P.2d 524 (1943); *Bogay* v. *Sawtelle,* 53 Ariz. 304, 88 P.2d 999 (1939); *Dennison* v. *State,* 34 Ariz. 144, 268 P. 617 (1928).

To the extent that residence is a state law question, review in this Court is not proper. However, this

Court has also repeatedly ruled that Indian reservations are physically part of the states in which they lie. *Langford* v. *Monteith,* 102 U.S. (12 Otto) 145 (1880), *United States* v. *McBratney,* 104 U.S. 621 (1882); *Utah & Northern Ry. Co.* v. *Fisher,* 116 U.S. 28 (1885); *Thomas* v. *Gay,* 169 U.S. 264 (1898); *Wagoner* v. *Evans,* 170 U.S. 588 (1898); *Montana Catholic Missions* v. *Missoula County,* 200 U.S. 118 (1906); *see also Kahn* v. *Arizona Tax Com'n,* 16 Ariz. App. 17, 490 P.2d 846 (1971), *appeal dismissed,* 411 U.S. 941 (1973).

D. The State Has Sufficient Authority for the Protection of Its Offices

Appellants propose a number of hypotheticals of Indian officeholders engaging in wrongdoing with no state authority to protect state and county interests. While it is not possible to respond authoritatively to all of these, some important observations can be made.

Indians off of reservations are, of course, normally subject to all state laws. *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148-149 (1973). And in Arizona, state civil process at least would reach onto the reservation for such an event. *Francisco* v. *State, supra.* In *Indian Oasis School District No. 40* v. *Zambrano,* 22 Ariz.App. 201, 526 P.2d 408 (1974), Indian school board members were held subject to state court jurisdiction for on-reservation official acts. The premise of these cases is that Indian reservation self-government is the area pre-empted from state authority, and the matters at issue in these cases did not infringe upon tribal self-government. The same premise was relied upon by this Court in *Moe* v. *Confederated Salish and Kootenai Tribes,* —— U.S. —— (Nos. 74-1656 and

75-70; 44 U.S.L.W. 4535, Apr. 27, 1976), in which the Court sustained collection of a cigarette tax from Indian sellers on the reservation, where the burden of the tax was on non-Indian buyers.

Also, at the least many state criminal standards are applicable to reservation Indians through the Assimilative Crimes Act, 18 U.S.C. § 13, as applied by 18 U.S.C. § 1152. *See, e.g., United States* v. *Sosseur,* 181 F.2d 873 (7th Cir. 1950).[3]

For these reasons, the state has adequate protections for its interests.

CONCLUSION

For the reasons stated, this Court is respectfully requested to dismiss the Appeal or to affirm the judgment of the court below.

Respectfully submitted,

RICHARD B. COLLINS
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone: (303) 447-8760

ALAN R. TARADASH
P. O. Box 306
Window Rock, Arizona 86515
Telephone: (602) 871-4151

---

[3] In Evans v. Cornman, *supra,* federal court jurisdiction over crimes was advanced as a reason to sustain a state law disenfranchising federal enclave residents, but this Court rejected the argument, 398 U.S. at 424.